No. 84-755 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In our opening brief we set forth the reasons for holding that the detention of respondent was lawful because the Customs officers had a reasonable suspicion, based on objective facts, that respondent was carrying narcotics within her digestive tract. Nothing in respondent's answering brief refutes our position.

1. Our principal argument (Br. 13-34) is that as a result of the government's compelling interest in protecting the integrity of the nation's borders, a relaxed standard of reasonableness applies in assessing border searches and detentions under the Fourth Amendment.[1] In order to

[1]Respondent attacks (Br. 16-17) our reference to a "relaxed reasonableness standard," but she appears to misunderstand our use of that phrase. We refer simply to the fact, not disputed by respondent (see Br. 10-14, 16-17), that the Fourth Amendment standard applicable to a search or seizure at the border is less stringent than the standard that would apply to ascertain the reasonableness of the same government activity occurring away from the border.

determine the quantum of suspicion necessary to justify a particular type of government action under this standard, the purpose of the search or detention must be weighed against its intrusion upon the suspect's legitimate expectations of privacy and liberty. Cf. *United States* v. *Sharpe,* No. 83-529 (Mar. 20, 1985), slip op. 10 (in assessing the propriety of a *Terry* stop, it is necessary "to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes" in addition to the duration of the stop). Since the purpose of the detention here was to intercept narcotics that otherwise would have been brought into the country and the intrusiveness of the detention was largely a function of respondent's own actions, a reasonable suspicion standard properly accommodates the interests of the government and respondent.

a. Respondent endorses this analytic approach, adopting what she characterizes as a Ninth Circuit rule that "evaluates the length of the detention in light of the purposes to which the law enforcement officers put the time during which the suspect is detained" (Br. 22). Respondent acknowledges (Br. 20-21 & n.47, 22, 23) that lengthy border detentions may be permissible under this test, but, citing this Court's decision in *Dunaway* v. *New York,* 442 U.S. 200 (1979), she asserts that the detention here was impermissible because its goal was to "produce incriminating evidence" (Br. 21-23).[2]

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[2]At another point in her brief, respondent suggests (Br. 17-20) that the detention in this case is unlawful because it does not qualify as a permissible stop under *Terry* v. *Ohio,* 392 U.S. 1 (1968), and its progeny. We agree that if the detention in this case had occurred within the United States it would not pass muster as a *Terry* stop, but we reject respondent's unsupported assertion that *Terry*'s limits apply to detentions at the border. Respondent acknowledges (Br. 10-11) that a search of luggage and the other elements of a routine border search are reasonable even if based upon a "subjective hunch." That is because the special considerations relating to searches at the border mandate the relaxation of the probable cause standard that otherwise would apply to such a search (U.S. Br. 14-16). These same considerations equally require relaxation of the standard that otherwise would govern more intrusive searches and detentions (see U.S. Br. 14-16, 22-24). Moreover, respondent's reliance upon *Terry* is contradicted by her approval (Br. 20-21 & n.47, 22-23) of border detentions that clearly exceed the scope of a permissible non-border *Terry* stop.

The flaw in respondent's argument is her failure to recognize that the purpose of the detention at issue in this case was not solely, or even principally, to obtain evidence for a criminal prosecution. Customs officers are authorized to search and detain persons at the border in order to detect "merchandise * * * imported contrary to law" (19 U.S.C. 482). This Court's decisions concerning the status of border searches under the Fourth Amendment have recognized that "broad powers [to conduct border searches] have been necessary to prevent smuggling and to prevent prohibited articles from entry." *United States* v. *12 200-Ft. Reels of Film,* 413 U.S. 123, 125 (1973); see also *United States* v. *Ramsey,* 431 U.S. 606, 619 (1977). Thus, respondent was not detained solely for investigatory purposes as was the suspect in *Dunaway*.[3] The Customs officers detained respondent because they reasonably believed that the detention was necessary to prevent the importation of drugs into this country. Indeed, the detention at issue in this case goes to the heart of the government's interest in maintaining the integrity of the borders.[4]

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[3]Respondent's reliance on *Dunaway* is misplaced for the additional reason that the Court in that case was concerned "with the events occurring during the detention" — the transportation of the defendant from a private dwelling to a police station and the custodial interrogation resulting in a confession. *United States* v. *Sharpe,* slip op. 8 & n.4. Respondent was not subjected to sustained interrogation of this type.

[4]Of course, as this case demonstrates, smugglers frequently are prosecuted if they are discovered. However, this does not detract from the

Customs officers can use reasonable investigative techniques to detect contraband carried in travelers' pockets and in their suitcases. The government is not required to admit alimentary canal smugglers such as respondent into the country, as respondent suggests (Br. 15), simply because they utilize a novel method to import their cargo. We submit that the government's interest in preventing the importation of illegal drugs is sufficiently compelling to justify the use of reasonable investigative techniques to detect these smugglers. Therefore, the Customs officers acted lawfully by detaining a reasonably suspected smuggler for the time required to examine her bodily wastes in order to determine whether she was carrying contraband.[5]

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fact that the principal purpose of Customs inspections is to prevent the importation of contraband.

In respondent's view, an extended border detention apparently is justified only if the purpose of the detention is to obtain a court order authorizing a search (Br. 22-23). This purpose cannot be more important than the government's interests in preventing the importation of contraband and detecting illegal activity, especially in view of the fact that neither a warrant nor any other type of court order is needed to effect a border search or detention (see U.S. Br. 15-16).

[5]Respondent nowhere sets forth the quantum of suspicion that she believes necessary to justify the detention of an alimentary canal smuggler, although her adoption of the Ninth Circuit's approach (Br. 23) indicates that she would apply the "clear indication" standard applied by the court below. However, this Court's decision in *Winston* v. *Lee*, No. 83-1334 (Mar. 20, 1985), slip op. 7-9, makes clear that the Ninth Circuit erred in concluding that "clear indication" refers to an intermediate standard between probable cause and reasonable suspicion. See also U.S. Br. 23-24 n.18.

Respondent intimates (Br. 14-16) that the test applied by the Ninth Circuit will not preclude the government from detaining suspected smugglers. However, in the very case cited by respondent, *United States* v. *Mendez-Jimenez*, 709 F.2d 1300 (9th Cir. 1983), the court distinguished a prior decision invalidating an X-ray search by noting, among other things, that the suspect in *Mendez-Jimenez* was found with an anti-diarrhea pill and there was evidence of passport tampering (*id.* at 1304). This evidence, of course, is not present in most alimentary canal smuggling cases (see U.S. Br. 39-41).

b. Respondent refers repeatedly (*e.g.*, Br. 17, 19, 20, 23, 26) to the length of her detention in arguing that the detention was unlawful. We do not deny that the detention was long, but respondent completely ignores the unanimous conclusion of the court below that respondent herself prolonged the detention by refusing food and drink in an "heroic effort[ ] to resist the usual calls of nature" (see Pet. App. 4a, 9a; see also U.S. Br. 27-28). A suspect cannot prolong his detention and then successfully challenge the detention because of its duration. In *United States* v. *Sharpe, supra,* this Court rejected the defendants' claims that their detention exceeded the permissible duration of a *Terry* stop, noting that "[t]he delay in this case was attributable almost entirely to the evasive actions of [defendant] Savage, who sought to elude the police * * *" (slip op. 12). The stop was not unreasonable, the Court concluded, because the police had acted diligently and the "suspect's actions [had] contribute[d] to the added delay about which he complains." Slip op. 12-13; see also *id.* at 9 (Marshall, J., concurring in the judgment) (a more lengthy detention can qualify as a valid *Terry* stop upon a "showing that [the] lengthier detention was not unduly *intrusive* for some reason; * * * for example, [if] the suspects, rather than the police, * * * have prolonged the stop") (emphasis in original; footnote omitted).

Sharpe makes clear that the intrusiveness of the detention in this case cannot properly be assessed simply by examining its duration. Of course, it is not possible to identify the portion of the detention that did not result from respondent's delaying tactics, and, in view of respondent's behavior, this burden should not be placed upon the government. We submit that a cooperative suspect who does not refrain from eating and drinking, and who ingests laxatives if needed to speed his body processes, would not be detained for an extended period of time. In many cases, the detention might

not exceed the period that travelers are detained for routine Customs inspections at congested airports. This Court therefore should uphold the detention of a suspected alimentary canal smuggler for the time required to examine his bodily wastes. Cf. *United States* v. *Sharpe*, slip op. 10 (in assessing a *Terry* stop, it is necessary to consider "the time reasonably needed to effectuate" the law enforcement purposes to be served by the stop).[6]

We stated in our opening brief (at 28-29) that the detention in this case was not improperly intrusive for the additional reason that respondent rejected the alternative of a more expeditious X-ray search. Respondent concedes (Br. 28-29 n.63) that "there is much to be said" for this reasoning if one assumes that an X-ray search is less intrusive than the detention. That precisely is our position: a suspect who refuses a less intrusive X-ray search cannot complain of the special intrusiveness of a lengthy detention.[7]

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[6]Respondent challenges this result because the detention has no finite duration (see Br. 24). However, respondent would uphold a detention for the time necessary to obtain a court order or search warrant (see Br. 22-23), despite the fact that such detentions have no inherent time limit and are not at all within the suspect's control. Moreover, a court could, of course, find that a detention was overly intrusive in an especially egregious case.

Respondent also asserts that this standard would leave too much to the discretion of Customs officers (Br. 24 & n.56). First, Customs officers' discretion is limited because the detention must be supported by reasonable suspicion. Moreover, as we discussed in our opening brief (at 26-29), the suspect, much more than the Customs officer, has control over the length of the detention because its duration depends only on the time that it takes for the suspect to move his bowels. Finally, the Customs officer's diligence is relevent in assessing the reasonableness of the detention. Cf. *United States* v. *Sharpe*, slip op. 11; *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 13.

[7]While we contend that either procedure is justified on the basis of a reasonable suspicion of alimentary canal smuggling, we believe that

The Court need not address this issue if it determines that the detention was reasonable in view of its purpose and respondent's responsibility for its duration. However, unlike respondent (Br. 29-31), we do not believe that this Court is barred from considering this issue because of the absence of information in the record concerning the health effects of X-rays. None of the courts of appeals that have addressed this issue has relied upon such evidence. *United States* v. *Vega-Barvo*, 729 F.2d 1341, 1349-1350 (11th Cir. 1984), cert. denied, No. 84-5553 (Dec. 10, 1984); *United States* v. *Mejia*, 720 F.2d 1378, 1382 (5th Cir. 1983); *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982). Similarly, this Court did not cite any medical evidence in upholding a routine blood test against a Fourth Amendment challenge in *Schmerber* v. *California*, 384 U.S. 757 (1966). Here, as in *Schmerber*, the "tests are a commonplace in these days of periodic physical examinations and experience with them teaches * * * that for most people the procedure involves virtually no risk, trauma, or pain" (384 U.S. at 771 (footnote omitted)). Thus, the Court is free to assess the X-ray issue and should conclude that respondent's decision to forgo the X-ray search substantially ameliorates the intrusiveness of the detention.[8]

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most persons would view the X-ray search as less intrusive. Respondent's analysis (Br. 28-29 n.63) of *United States* v. *Mosquera-Ramirez*, 729 F.2d 1352 (11th Cir. 1984), supports this view.

Respondent melodramatically characterizes (Br. 26) the X-ray option as "a dose of poison" because she claimed that she was pregnant. It is not easy to take this assertion seriously in the circumstances of this case. X-rays are not utilized unless medical personnel determine that they present no special danger to the individual; in this case, the medical personnel performed a pregnancy test and determined that respondent's claim was false (U.S. Br. 7; J.A. 64).

[8]This Court's decision in *Winston* v. *Lee*, *supra*, which reaffirmed *Schmerber*, does not alter the analysis of this issue. First, that case dealt with "surgical intrusions beneath the skin" to be performed under a general anesthetic (slip op. 7, 11). It therefore does not apply to the use

2. In our opening brief (at 34-37), we explained that respondent, as an alien seeking to enter the country, had a severely limited expectation of privacy and liberty at the border and that it was therefore lawful for the Customs officers to detain her on the basis of their reasonable suspicion that she was engaged in smuggling even if detention of a citizen on the same basis would have been impermissible. Respondent does not contest our showing that an alien has substantially reduced expectations of liberty and privacy when seeking to enter the United States. She asserts only (Br. 32) that this fact is not relevant in this case because an Immigration inspector already had admitted her into the United States.

Respondent is incorrect. The stamping of her visa by an Immigration officer did not effect her entry into this country within the meaning of the immigration laws. Entry into the United States does not occur until the alien's "physical presence is accompanied by freedom from official restraint." *United States* v. *Oscar,* 496 F.2d 492, 493 (9th Cir. 1974). In *Oscar,* the court held that two aliens "had not 'entered' the United States because they were never free from the official restraint of the customs officials at the San Ysidro Port of Entry." *Id.* at 493; see also *In re Dubbiosi,* 191 F. Supp. 65 (E.D. Va. 1961) (alien who had received a permit making him eligible to go ashore did not effect "entry" because he remained under official restraint); *In re Pierre,* 14 I. & N. Dec. 467, 468-469 (1973) ("[a]n 'entry' involves * * * freedom from restraint"). Since she had not yet entered the country, respondent remained subject to detention and examination under the immigration statutes

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of devices such as X-rays and magnetometers, which do not involve such an intrusion. Second, *Winston* did not involve a border search and therefore does not take account of the government's heightened interest in such procedures when they are necessary to prevent the importation of contraband.

and could not have had expectations of liberty and privacy greater than those recognized under the statutes.[9]

Moreover, whether or not respondent technically had been admitted to the country is not the determinative point in assessing her legitimate expectations of liberty and privacy while still at the border. The immigration statutes embody society's decision that aliens at the border cannot legitimately expect the same privacy and liberty as returning citizens. This determination remains relevant until the alien actually passes into the country free of government control.

Respondent also argues at length (Br. 32-36) concerning the equal protection rights of aliens. Although her point is not entirely clear, she appears to assert that any distinction in the Fourth Amendment rights of aliens and citizens at the border violates aliens' right to equal protection. Any such contention is frivolous. We have never disputed that respondent is entitled to the protection of the Fourth Amendment. However, the contours of that protection necessarily vary from the protections accorded to citizens because Congress has by statute differentiated between the privacy and liberty interests accorded to aliens and citizens at the border. That Congress has provided more stringent criteria conditioning aliens' rights to enter the country, or has required them to submit to medical examinations not required of citizens, or has directed the exclusion of aliens on the basis of facts or suspicions that do not justify exclusion of citizens is unquestionably a part of its legitimate powers to legislate on the subject of immigration, which by

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[9]We note as a point of information that the Attorney General is authorized to confer upon "any employee of the United States" the powers and duties of Immigration officers (8 U.S.C. 1103(a)). This authority frequently is utilized to empower Customs officers to exercise the powers of Immigration officers as well.

definition affects aliens but not citizens. The equal protection principle does not require differently situated people to be treated the same.

3. Finally, respondent argues (Br. 39-43) that even if the reasonable suspicion standard governs the permissibility of border detentions of suspected alimentary canal smugglers, the "articulably suspicious behavior" found to support such detentions in other cases was not present here. As we explained in our opening brief (at 37-43), this contention simply misperceives the state of the evidence, which, according to the court below, demonstrated that respondent "possessed almost all the indicators" used to identify alimentary canal smugglers (Pet. App. 3a n.3).[10]

Respondent's vague and implausible story, and the other indicia of smuggling present in this case, closely parallel the facts that courts of appeals have relied upon in concluding Customs officers had a reasonable suspicion of alimentary canal smuggling (see U.S. Br. 39-42). When these facts are combined with the unusual arrangement of respondent's undergarments it is clear that the Customs officers had

[10]Quoting her trial attorney's statement that "there was no clear indication or probable cause or any grounds to hold [respondent] when the strip search was negative," respondent maintains (Br. 39 n.90) that we err in asserting (Br. 38 n.31) that she had waived any claim that the evidence available to the Customs officers at the time of her detention failed to meet the reasonable suspicion standard. The sentence upon which respondent relies however, was merely a preface for her argument that "the facts in this case *do not justify a finding of probable cause for the detention, or even clear indication* for the X-ray search or the body cavity search that was ultimately performed" (J.A. 34-35 (emphasis added)). Respondent's attorney made no claim that the facts also were insufficient to satisfy the reasonable suspicion standard, as we believe she was required to do to preserve that contention for further review.

abundant grounds to suspect respondent of alimentary canal smuggling.[11]

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[11]Respondent directs (Br. 1-2 n.1) the Court's "particular attention" to Exhibit 102, the "book of invoices" carried by respondent. This "book" is a portfolio containing a hodgepodge of cash register tapes and other receipt forms, some bearing no name, some bearing respondent's name, and some bearing the name of a person other than respondent. This disorganized collection of receipts bears no resemblance to records that actually are used for business purposes and instead seems designed solely to create the appearance that their possessor is a business traveler. The invoices thus support rather than undermine the Custom officers' determination.

Respondent errs (Br. 4 & n.3) in asserting that the Customs officers did not initially apply for a court order because they believed the facts would not support such a request. Agent Windes testified (J.A. 22-23) that he erroneously believed that the policy of the Customs Service was not to apply for court orders authorizing X-ray searches.

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